SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUL 16 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1968

## No. 296

PAUL WALTER PEARCE,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILIP G. DENMAN
3115 Pacific Avenue
Virginia Beach, Virginia

AND

RICHARD G. BRYDGES
1369 Laskin Road
Virginia Beach, Virginia 23451
*Attorneys for Petitioner*

PRINTED BY TEAGLE & LITTLE, INC., NORFOLK, VA.

# INDEX


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| CONSTITUTIONAL PROVISION INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | 6 |
| CONCLUSION | 10 |
| APPENDIX | 1a |


## TABLE OF CITATIONS

### *Cases*


| | |
|---|---|
| *Aguilar* v. *Texas*, 378 U.S. 108, 114-115 (1963) | 7 |
| *Beck* v. *Ohio*, 379 U.S. 89, 96, 97 (1964) | 6,7,10 |
| *Jones* v. *United States*, 362 U.S. 257, 269 (1960) | 9 |
| *Henry* v. *United States*, 361 U.S. 98 (1959) | 7 |
| *Katz* v. *Peyton*, 334 F.2d 77 (4 Cir. 1964) | 9 |
| *Potter* v. *United States*, 362 F.2d 293 (5 Cir. 1966) | 10 |
| *United States* v. *Bonanno*, 180 F. Supp. 71 (S.D.N.Y. 1960) | 7 |
| *United States* v. *Boston*, 330 F.2d 937 (2 Cir. 1964) cert. denied 377 U.S. 1004 (1963) | 6 |

## TABLE OF CITATIONS (Cont'd)


*Page*

*United States* v. *Nicholas*, 319 F.2d 697 (2 Cir. 1963) ..... 7

*United States* v. *Rivera*, 321 F.2d 704 (2 Cir. 1963)
1 Crim. L. Bull. 1 (1965) ..... 6

*United States* v. *Ventresca*, 380 U.S. 102 (1965) ..... 6

*Wong Sun* v. *United States*, 371 U.S. 471, 479-480 (1962) .. 6


## STATUTES


26 U.S.C. Section 5601 (a) (12) ..... 2

26 U.S.C. Section 5205 (a) (2) ..... 2

26 U.S.C. Section 5604 (a) (1) ..... 2

26 U.S.C. Art. 7603 ..... 6


## INDEX TO APPENDIX


Appendix A
Memorandum of the United States District Court.....1a

Appendix B
Judgment Order of the United States District Court....9a

Appendix C
Order of the United States Court of
Appeals for the Fourth Circuit.....11a

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1968

---

## No.

---

PAUL WALTER PEARCE,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

---

Petitioner, Paul Walter Pearce, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above styled case on June 17, 1968.

## OPINIONS BELOW

No opinions were rendered either by the United States District Court for the Eastern District of Virginia, Norfolk, Virginia, or the United States Court of Appeals for the Fourth Circuit. A memorandum of the United States District Court for the Eastern District of Virginia,

Norfolk, Virginia, entered December 5, 1967, is not officially reported.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was dated and entered June 17, 1968. The jurisdiction of the Court is invoked under 28 U.S.C.A. § 1254 (1).

## QUESTIONS PRESENTED

Whether the search without a warrant which produced the evidence leading to the Petitioner's conviction was unlawful and in violation of his rights under the Fourth Amendment to the United States Constitution?

## CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

Petitioner was charged in separate two-count indictments with violation of 26 U.S.C. §5601 (a) (12), and violation of 26 U.S.C. §5205 (a) (2) and 5604 (a) (1). (Internal Revenue—removing, concealing and possessing non-tax-paid liquor).

Trial of Petitioner was in the United States District Court, Norfolk Division, on August 2nd, 1967. Trial by jury was waived and the case was heard solely upon the Petitioner's motion to suppress evidence obtained from the search of a pickup truck registered in your Petitioner's name without a search warrant, for a lack of probable cause. This sole issue determined the innocence or guilt of the Petitioner.

The facts surrounding the arrest of the Petitioner are the key to the case. The application of case law and the Constitutional protections of the Petitioner turn solely on the facts.

The Petitioner was arrested on November 9, 1966, while a passenger in a pickup truck, registered in the Petitioner's name, being driven by Charlie Graham Gregory. The vehicle was stopped deliberately and intentionally by Alcohol, Tobacco and Tax Unit Agents. The Agents had been previously notified that the truck had returned from the Eastern Shore of Virginia to the Norfolk area, the notice being in accordance with arrangements with the Chesapeake Bay Bridge-Tunnel Police.

The vehicle was proceeding in a lawful manner at the time it was stopped and no crimes of any nature were committed in the presence of any of the Agents. Without search warrant, the Agents proceeded to search the Petitioner's vehicle and only after opening a door to the truck, four and one-quarter gallons of non-tax-paid liquor were found. Indictments were subsequently obtained.

According to the Agents' testimony at the trial, the following information was available to the arresting offi-

cers. Agent McFarland had received anonymous telephone calls that essentially gave the residence of Charlie Graham Gregory, the fact that he was making whiskey on the Eastern Shore of Virginia and that whenever he drove a pickup truck, registered in your Petitioner's name, from the Eastern Shore to the Norfolk area, with the Petitioner, that the vehicle was carrying whiskey. Deliberate surveillance of the Petitioner and Gregory revealed absolutely no criminal activity whatsoever. Agent Berge had received a call from a Sergeant Thomas of the Chesapeake Vice Squad to the effect that an undivulged informant of unknown reliability had stated that Gregory lived on the Eastern Shore of Virginia, that he drove a truck registered in the Petitioner's name, that Gregory was making whiskey and that whenever the truck returned from the Eastern Shore to Norfolk, it was carrying whiskey. That information was allegedly available at the time of the arrest.

At the conclusion of the trial, the Judge requested memoranda of law and later advised that the testimony of Sergeant Thomas should be taken for the record. By letter of September 18, 1967, the U. S. Attorney informed the trial court that Agent Berge had erred in his identification of Sergeant Thomas and that Sergeant Gary Arnold Barnett was the actual source of his information.

On December 5, 1967, the District Court Judge filed his memorandum denying the Petitioner's motion to suppress the evidence. December 29, 1967, was set for sentencing of the Petitioner.

The trial Court was informed by letter from defense counsel, dated December 20, 1967, that the Petitioner

had been advised that Barnett had not supplied the information alleged by Berge and requested a further hearing at the time of the sentencing.

A further hearing was held on December 29, 1967, at which it was established that Sergeant Thomas had supplied no information to Agent Berge. Sergeant Barnett was the source, but he denied specifically and flatly that any information was given as to the vehicle ever carrying liquor. He did give Berge information as to the license of a truck owned by Petitioner, that Gregory drove it occasionally and a telephone number where Gregory could be reached on the Eastern Shore. Barnett's source was undivulged and of unknown reliability and credibility. Agent Berge persisted in testimony that he obtained the further information of the carrying of whiskey from Barnett although, he, Berge, did not keep any records to indicate the source of any such information. All of the Agents knew that the Petitioner and Gregory were previous violators of whiskey laws.

At the conclusion of the hearing on December 29th, 1967, the Trial Judge reaffirmed his decision over-ruling the Petitioner's motion to suppress the evidence, found the Petitioner guilty, and proceeded to sentence the Petitioner to eighteen (18) months confinement. An Appeal to the Court of Appeals for the Fourth Circuit was duly made.

Argument was heard by the Court of Appeals on May 10th, 1968, and on June 17th, 1968, the Court of Appeals affirmed the judgment of the District Court.

## ARGUMENT

The search and seizure in this cause violated the rights of the Petitioner under the Fourth Amendment of the Constitution of the United States as the law enforcement officials had no probable cause to believe a crime was being committed in their presence. There was no search warrant in this case and it has been conceded by all parties that no crime of any type was committed in open view or within the actual observation of the law enforcement officials. (Tr. p. 74, 75). The evidence in this case, four and one-quarter gallons of non-tax-paid liquor, was found only after the search of the pickup truck registered in the Petitioner's name and driven by Charlie Graham Gregory. (Tr. p. 77).

The Alcohol, Tobacco and Tax Unit Agents were unquestionably proceeding under 26 U.S.C. Art. 7603. "Reasonable grounds" recited in the preceding Article has the same meaning as probable cause. *United States* v. *Boston,* 330 F. 2d 937 (2 Cir. 1964) cert. denied 377 U.S. 1004 (1963).

The Government has the burden of proof as to the existence of probable cause in this cause. *United States* v. *Rivera,* 321 F. 2d 704 (2 Cir. 1963); I Crim. L. Bull. 1 (1965). Due to the lack of a search warrant, the burden may require a greater showing of probable cause than in cases involving warrants. The Court's holdings in this regard have been set forth in *United States* v. *Ventresca,* 380 U.S. 102 (1965); *Wong Sun* v. *United States,* 371 U.S. 471, 479-480, (1962); *Beck* v. *Ohio,* 379 U.S. 89 (1964).

Evidence obtained in a search incident to an arrest

made without probable cause may be properly suppressed. Physical restraint is not necessary as arrest is consummated upon stopping a car. *Henry* v. *United States,* 361 U.S. 98 (1959). See also, *United States* v. *Nicholas,* 319 F. 2d 697 (2 Cir. 1963); but cf., *United States* v. *Bonanno,* 180 F. Supp. 71 (S.D.N.Y. 1960). Petitioner's movement was restricted when the ATTU Agent used siren and flashing light to stop the Petitioner's vehicle. (Tr. p. 74). Clearer manifestation of the Petitioner's restriction of liberty was shown when the Petitioner was unable to seek privacy to urinate without accompaniment by an Agent. (Tr. p. 77).

Whether the defendants should prevail in their attempt to exclude the fruits of a search conducted subsequent to this arrest must turn on the nature and quantum of information possessed by the Agents at the time of the arrest. The inquiry must be whether the "facts available to the officers at the moment of arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed." *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964).

There was no testimony that any illicit liquor was ever seen by the Agents prior to the arrest or they had any reason *to believe* that an offense was being committed. (Tr. p. 75). The conclusion that a source is reliable may not be conclusory but must be rationally drawn from some related "underlying circumstances." *Aguilar* v. *Texas,* 378 U.S. 108, 114-115 (1964). The Petitioner's pickup truck was stopped, and the Petitioner arrested, while proceeding lawfully on Military Highway in the City of Chesapeake, Virginia. The truck was stopped after ATTU Agents had been notified by the Chesapeake

Bay Bridge-Tunnel Police, under previous instructions, that the truck was returning from the Eastern Shore of Virginia. (Tr. p. 63, 70).

Prior to the arrest the following information was available to the ATTU Agents. First: Agent McFarland testified on August 2nd, 1967, that he had received several anonymous telephone calls to the effect that the Petitioner and Charlie Graham Gregory were operating a still site on the Eastern Shore of Virginia, and certain information as to Gregory's truck and residence. Close surveillance of the Petitioner and Gregory was made on the Eastern Shore. The results were that not one single solitary bit of evidence was obtained as to the commission of any crimes by the Petitioner and Gregory. (Tr. p. 66-74).

Second: That approximately one month prior to Petitioner's arrest, Agent Berge had received a telephone call from a sergeant of the Chesapeake Vice Squad and told that an undivulged informant had stated every time the Petitioner's truck came from the Eastern Shore of Virginia to the Norfolk area with produce, that it was also carrying whiskey. (Tr. p. 84-85). On August 2nd, 1967, Agent Berge testified that the caller was Sergeant John D. Thomas. (Tr. p. 87). The Trial Court was notified by the U. S. Attorney on September 18th, 1967, that Berge had erred in his testimony and that the caller had in fact been a Sergeant Gary Arnold Barnett. On December 29th, 1967, upon further hearing in this cause it was established that Sergeant Thomas had never given any information, in regards to the issue in this cause, to Agent Berge. (Tr. p. 100-102). It was further established at the same time that Sergeant Barnett had called

Agent Berge and given him the license number of a truck registered to the Petitioner, information to the effect that Gregory could be reached at a telephone number on the Eastern Shore and that Gregory drove the truck to Chesapeake occasionally. (Tr. p. 105-108). Sergeant Barnett flatly denied ever giving Agent Berge any specific information that the truck in question carried whiskey. (Tr. p. 106). Agent Berge testified at the same time that Sergeant Barnett was his source although he kept no notes of his conversation. (Tr. p. 114-115). It was also established clearly that Sergeant Barnett's undivulged informant, of whatever information, was of absolutely unknown reliability. (Tr. p. 110).

Thus, at the time of Petitioner's arrest the only information available to the Agents was a series of anonymous telephone calls that produced no criminal information and disputed information from a Vice Squad Sergeant, received in turn from a source of unknown reliability, about which information no records had been kept and the details of which were disputed and contradicted. The only other information available was that the Petitioner and Gregory were past offenders of various liquor laws.

No testimony or corroboration was offered as to the identity or reliability of any informant. No holding that probable cause existed can be predicted on the ultimate reliability of information from anonymous informants or from those whose reliability is unknown, standing alone. *Katz* v. *Peyton,* 334 F. 2d 77 (4 Cir. 1964). There must be substantial basis for crediting hearsay. *Jones* v. *United States,* 362 U.S. 257, 269 (1960). Reliability plus corroboration might be sufficient under the *Katz* v. *Pey-*

*ton,* supra, but none was shown in the instant case. Mere suspicion of crime, without more, is not sufficient for probable cause.

The mere fact that the Petitioner used a certain highway, as predicted, is not sufficient corroboration as has been clearly shown in *Potter* v. *United States,* 362 F. 2d 293 (5 Cir. 1966). Nor is unspecified information from an unidentified informant plus a knowledge of a previous record of convictions and familiarity with that defendant's appearances, all taken together sufficient to constitute probable cause. *Beck* v. *Ohio,* supra, at p. 96-7.

The facts in this case are almost precisely the same as those in the *Potter* case, supra. The only difference in the informants was that in the instant case the information, the details of which were contradicted by the very source, was passed on by a police officer from an unreliable informant to the arresting officer. Unreliable information does not become reliable simply because it is passed along twice instead of once.

## CONCLUSION

To protect the integrity of the many decisions of this Court, to resolve conflicts among decisions of the Federal Appellate Courts, and to protect the Petitioner's rights under the Fourth Amendment of the Constitution of the United States, your Petitioner respectfully requests that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,
PHILLIP G. DENMAN

PHILIP G. DENMAN
3115 Pacific Avenue
Virginia Beach, Virginia

AND

RICHARD G. BRYDGES
1369 Laskin Road
Virginia Beach, Virginia 23451
*Attorneys for Petitioner*

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

| | | |
|---|---|---|
| United States of America | ) | |
| | ) | Criminal |
| v. | ) | Action |
| | ) | No. 13,217 |
| Charlie Graham Gregory and | ) | |
| Paul Walter Pearce | ) | |

---

## MEMORANDUM

Defendants were indicted for possession and removal of non-tax-paid distilled spirits in violation of 26 U.S.C.A., Sections 5601 (a) (12), 5205 (a) (2), and 5604 (a) (1). The case now stands on a motion to suppress certain evidence (illicit whiskey) obtained and seized by agents of the Alcohol and Tobacco Tax Unit (ATTU).

Beginning on August 1, 1966, William T. McFarland of the ATTU started receiving numerous phone calls in regard to the defendant Gregory who lived in Norfolk. These calls, about 12 in number, were all from the same unknown person who said that Gregory was operating a still on the Eastern Shore with two other named helpers and inquired as to the reason why he, Greg-

ory, was not arrested. These calls were received from August until November when the defendants were arrested. The caller also related to McFarland a description of the truck being used by Gregory—including its license number. An independent investigation by McFarland revealed that this particular truck was registered with the Virginia Division of Motor Vehicles to Paul Walter Pearce. Both Pearce and Gregory were known to McFarland as "violators," having previously been convicted in the United States District Court at Norfolk for whiskey violations. The circumstances relating to Gregory's continuous use of a truck registered in the name of Pearce, both being known whiskey violators were, standing alone, highly suspicious, even to the extent of supplying reasonable cause when the untested informant communications continued.

During this period from August 1, 1966, until November 9, 1966, when the arrest was made, Gregory was observed and trailed off and on by agents of the ATTU, and was observed in the Ford pickup in the vicinity of a suspected still site on the Eastern Shore.

About one month before the arrest, Earl W. Berge, another agent of the ATTU, received a tip from the vice squad of the Chesapeake Police (who in turn had received their information from an informer whose reliability was untested) concerning the defendant Gregory and his whiskey operations. The caller said that Gregory was making whiskey on the Eastern Shore and delivering it to Norfolk. Also, it was stated that Gregory was using a Ford pickup for hauling the whiskey and when this truck came through the Chesapeake Bay

Bridge-Tunnel loaded with produce, it would also be carrying illegal whiskey.

With this information in hand, McFarland went to the Chesapeake Bay Bridge-Tunnel Police and asked them to notify him when the truck in question went through the tunnel. On November 9, 1966, McFarland was called by the Tunnel Police and told that the truck was coming through the tunnel into Norfolk and was carrying produce. McFarland had other investigators begin following the truck from the Norfolk side of the tunnel. McFarland caught up with the truck at Providence Road on Military Highway and pulled in behind the truck. He recognized the two occupants as Gregory and Pearce. The red light and siren were turned on and defendants pulled over to the side of the road with McFarland pulling over behind them. At this time there was another car in front of the pickup with other ATTU investigators. Both defendants got out of the truck and met McFarland who was walking toward the truck. The three men talked for a moment, and McFarland looked at the produce on the rear of the truck. Pearce then began to run or walk rapidly away from the truck toward the woods and McFarland, thinking that he was trying to run away, followed and caught up with him. They returned to the truck. At this point McFarland went to the cab of the truck, opened the door and discovered the illegal whiskey on the floor alongside the front seat.

The issue involved here is one of probable cause; that is considering the totality of the circumstances, did McFarland act with probable cause in stopping the defendants. The question of whether probable cause existed must be determined only by the facts and circumstances

as they existed up until the time the defendants were stopped. Nothing that happened after the stopping can have any bearing on the issue. See *Potter* v. *United States*, 362 F. (2d) 493 (5 Cir., 1966).

A definition of probable cause has been set forth in the two leading cases of *Brinegar* v. *United States*, 338 U.S. 160 (1949); and *Carroll* v. *United States*, 267 U.S. 132 (1924).

> "Probable cause exists where the facts and circumstances within the officer's knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

See also *Beck* v. *Ohio*, 379 U.S. 89 (1964). The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. But it is quite clear that where the arresting officer acts *only* on the uncorroborated tip of an informer whom he does not know to be reliable, he does not have such a reasonable ground for belief of guilt. *Rodgers* v. *United States*, 267 F. (2d) 79 (9 Cir., 1959); *Contee* v. *United States*, 215 F. (2d) 324 (D.C. Cir., 1954).

In the instant case, the ATTU agents were initially alerted to Gregory's bootlegging operation by just such a tip—a tip from an unknown informer whose reliability was untested. They later received information from the Chesapeake Police that also was of questioned reliability since the source of this information was from an untested informer. Standing alone, this information would clearly be insufficient to establish probable cause. But there was

also present a substantial amount of corroboration observed personally by law enforcement officers. In dealing with these different items that corroborated the original information received from the informants it should first be noted that "Probable cause, however, can rest upon the collective knowledge of the police, rather than solely on that of the officer who actually makes the arrest," *United States* v. *Pitt,* 382 F.(2d) 322, (4 Cir., 1967). See also *United States* v. *Bianco,* 189 F.(2d) 716 (3 Cir., 1951). In considering the collective knowledge of the police, we must bear in mind that the required probable cause is the belief, reasonably arising out of circumstances known to the *seizing officer*—in this case McFarland—that the truck was being used for the illegal purpose of hauling whiskey. McFarland, as the officer stopping the truck, was not required to personally verify information coming from a member of the Vice Squad from the City of Chesapeake, even though the ultimate source of that information may have been an untested informer. This "collective knowledge" may be an accumulation of information coming into the hands of the enforcement authorities.

After receiving this first tip, McFarland, by his own investigation, found that the described Ford pickup was registered to Paul W. Pearce, a man known to McFarland as a violator of the whiskey laws. In addition, when the truck was placed under surveillance, it was found that, not only were frequent trips being made between Norfolk and the Eastern Shore, but also the truck while on the Eastern Shore was observed in the area of a suspected still site.

When the second tip from an informant was brought to McFarland's attention, this tended to corroborate the

information already at hand in that this informant named Gregory, stated that he was using a Ford pickup; and went on to describe how the operation was carried out. McFarland acted on this information and notified the Chesapeake Bay Bridge-Tunnel Police to inform him when the truck came through to Norfolk carrying produce.

Finally, when the Tunnel Police called and told McFarland that the truck was coming through with produce on it, and McFarland thereafter began following the truck on the Military Highway and recognized the occupants as the two defendants, he, McFarland, had personally verified all information that had been supplied by the informants, except whether or not the truck was actually carrying whiskey on that trip. With these numerous corroborating items on hand, it seems clear that, in stopping the defendants, McFarland was acting with probable cause as previously defined. See *Draper* v. *United States,* 358 U.S. 307 (1959); *Cavness* v. *United States,* 187 F.(2d) 719 (9 Cir., 1951); *United States* v. *Hopkins,* 263 F.(2d) 597 (7 Cir., 1959); *United States* v. *One 1957 Ford Custom Tudor,* 264 F.(2d) 682 (10 Cir., 1959); cf. *Henry* v. *United States,* 361 U.S. 98 (1959); *Rios* v. *United States,* 364 U.S. 253 (1960).

We agree, of course, as in *Carroll* v. *United States,* supra, that agents cannot stop every vehicle on the highway on the chance of finding liquor. We go further and say that merely because the driver and passenger in a vehicle are known to have been convicted of whiskey violations does not, standing alone, afford a basis for probable cause. However, it is clear that such fact, when aided by other information possessed by the arresting

officer, quickly supplies the evidence necessary for probable cause. *Ray* v. *United States,* 255 F.(2d) 473 (4 Cir., 1958); *Carroll* v. *United States,* supra; *Brinegar* v. *United States,* supra. As stated in *Brinegar,* "There was hearsay, but there was much more." While it may not be too unique a situation for a man living and presumably working on the Norfolk side of the Chesapeake Bay to occasionally travel to the Eastern Shore of Virginia, with the attendant tunnel expense and mileage, rather continuous trips in a truck registered in the name of another person known to be a whiskey violator and knowledge that such a person has been seen in the area of a suspected illegal distillery lends credence to the informant information which then, as in this case, furnishes the required reasonable cause to stop and search the vehicle.

Searches of automobiles that are constantly movable may make such search without a warrant a reasonable one, although the result might be the opposite in a search of a home, a store, or other fixed piece of property. *Cooper* v. *California,* 386 U.S. 58 (1967). We do not think, however, that the search can be questioned if the stopping of the truck was with reasonable cause. That the initial tip may have emanated from an unreliable informant(1) does not totally destroy the information received if, in fact, there be sufficient corroboration, before arrest, to justify a reasonable person, acting under the

---

(1) At the trial it developed that Agent Berge of the ATTU had received information from Sgt. Thomas of the City of Chesapeake Vice Squad. The Court, desiring the record to be complete, suggested that Sgt. Thomas be called to testify. It was then ascertained that Gary Arnold Barnett of the Vice Squad had supplied this information (i.e., what the informant had told him) to Berge, but that the informant had not previously supplied information and the reliability was untested.

totality of the circumstances; in believing that a crime was being committed. *United States* v. *Irby,* 304 F.(2d) 280 (4 Cir., 1962); *Katz* v. *Peyton,* 334 F.(2d) 77 (4 Cir., 1964). We believe that the corroborating circumstances clearly justify such a finding and, therefore, the motion to suppress must be denied.

The issue of suppression is the only point in the case. Since the seized whiskey is properly admissible, the guilt of the defendants must follow. The pleas of ignorance as to the presence of the box containing whiskey with the necks of the jugs exposed, located between the driver (Gregory) and the passenger (Pearce) are rejected.

(SGD) WALTER E. HOFFMAN
United States District Judge

At Norfolk, Virginia
Deceber 5, 1967

## APPENDIX B

# IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

| | | |
|---|---|---|
| United States of America | ) | |
| | ) | |
| v. | ) | No. |
| | ) | Cr. 13,217 |
| Paul Walter Pearce | ) | |

## JUDGMENT AND COMMITMENT OF ERROR

On this 29th day of December, 1967 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of NOT GUILTY and a finding of guilty of the offense of violation of Title 26, U.S.C.A., Sections 5601 (a) (12), 5205 (a) (2) and 5604 (a) (1) (Internal Revenue—Removing, Concealing and Possessing Distilled Spirits) as charged in two Counts in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS, unless sooner released by operation of law.

IT IS ORDERED that the Clerk deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/WALTER E. HOFFMAN
United States District Judge.

APPENDIX C

# OPINION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

No. 12,091

---

UNITED STATES OF AMERICA,
*Appellee,*
versus
CHARLIE GRAHAM GREGORY,
*Appellant.*

---

No. 12,092

---

UNITED STATES OF AMERICA,
*Appellee,*
versus
PAUL WALTER PEARCE,
*Appellant.*

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK WALTER E. HOFFMAN, CHIEF DISTRICT JUDGE.**

---

(Argued May 10, 1968. Decided June 17, 1968.)

---

Before BOREMAN, BRYAN and BUTZNER, Circuit Judges.

---

Richard G. Brydges, (H. Calvin Spain, and Brydges,

Broyles & McKenry on brief) for Appellants, and James A. Oast, Jr., Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, on brief) for Appellee.

---

PER CURIAM:

The appellants, Charlie Graham Gregory and Paul Walter Pearce, assign the same trial error in their convictions for removing, concealing and possessing tax-unpaid distilled spirits, 26 USC 5601 (a), 5205 (a) (2) and 5604 (a) (1): that is, the admission in evidence of the whiskey when without a search warrant it had been found and seized in an allegedly illegal search of the pickup truck occupied by the appellants on November 9, 1966, at Chesapeake, Virginia.

Aided by his discussion of the circumstances of the search and the law on the subject, we think with the District Judge that there was probable cause for the search, and that the liquor was rightly received as proof of the crime. With its receipt, there was evidence aplenty to convict and we affirm the judgments of guilt.

Affirmed.

Office-Supreme Court, U.S.
FILED
AUG 16 1968
JOHN F. DAVIS, CLERK

No. 296

# In the Supreme Court of the United States

OCTOBER TERM, 1968

PAUL WALTER PEARCE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*
FRED M. VINSON, Jr.,
*Assistant Attorney General,*
BEATRICE ROSENBERG,
MERVYN HAMBURG,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 296

PAUL WALTER PEARCE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a nonjury trial in the United States District Court for the Eastern District of Virginia, petitioner and his codefendant, Charlie Graham Gregory, were convicted of unlawful possession and removal of untaxed liquor. On December 29, 1967, petitioner was sentenced to eighteen months' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. C).

The evidence adduced at a hearing on petitioner's motion to suppress showed that on August 1, 1966, Agent McFarland of the Alcohol and Tobacco Tax Unit received information from a telephone caller, who refused to identify himself, that codefendant Gregory had moved from Norfolk, Virginia, across the



316-870—68

Chesapeake Bay to Melfa, on the Eastern Shore, and was operating a distillery near Tasley, Virginia, with two other men (Tr. 66–67).[1] McFarland subsequently received about a dozen calls from this unknown person, giving additional information about Gregory, which was verified by independent investigation. The caller identified the trailer court where Gregory was residing, described the colors of Gregory's trailer, and stated that he drove a 1961 Falcon automobile. Later, the caller told McFarland that Gregory had disposed of the car and trailer, and had purchased a 1966 Ford pickup truck (Tr. 73). On several occasions, McFarland and other agents observed Gregory operating such a truck, which was registered in petitioner's name, near the suspected still site in Tasley (Tr. 69). Both petitioner and Gregory were known to McFarland as having been previously convicted of violating the federal liquor laws (Tr. 70).

Approximately one month before petitioner's arrest, agent Berge told McFarland that he had received information from the police department of Chesapeake, Virginia, near Norfolk, that Gregory was living near Melfa in a trailer camp, and that he was making whiskey there and delivering it to Norfolk. Berge said that when the truck left the Eastern Shore carrying produce, it was also carrying untaxed whiskey (Tr.

[1] Since the only contested issue was the legality of a search, and the parties acknowledged that the evidence adduced at the suppression hearing would be the same as the trial evidence, no separate hearing on the issue of guilt was conducted. Citations are to volume two of the three-volume record filed with the Clerk of this Court.

85).[2] The source of the information was an untested informant (Tr. 110).

Thereafter, McFarland asked the Chesapeake Bay Bridge-Tunnel Police to notify him when Gregory's truck went through the tunnel complex. On the evening of November 9, the truck was sighted by the Bridge-Tunnel Police headed toward Norfolk carrying a load of produce (Tr. 86). Berge and McFarland halted the truck south of Norfolk. Both Gregory (who was driving) and petitioner alighted from the cab and walked back toward McFarland's car. They met McFarland, whom they recognized, at the rear of the truck, and exchanged greetings with him. Gregory told the agent that "The only thing I got is sweet potatoes" (Tr. 64). While the agents were inspecting the rear of the truck, petitioner began to walk hurriedly toward the woods adjacent to the road. McFarland gave chase, and caught up to petitioner when he tripped on a bucket and fell (Tr. 65). When they returned to the truck, McFarland opened the passenger's door of the cab section and found an open carton containing four one-gallon jugs of untaxed liquor; two one-pint bottles of untaxed liquor were also found on the seat (Tr. 64–65).

---

[2] At a post-trial hearing, the police sergeant who passed on the information to Berge testified that he had told Berge that Gregory was using the truck registered in petitioner's name to drive from the Eastern Shore to Chesapeake, but he could not recall relating anything about the significance of the truck being loaded with produce. However, this information was found in Berge's report, dated one week after petitioner's arrest (Tr. 108–109, 115–116). At the end of the hearing, the court stated that its conclusions would not be affected by this discrepancy (Tr. 131).

The sole issue raised by petitioner is whether the agents had probable cause to search the truck. The subject of agent McFarland's investigation was Gregory; petitioner's arrest, although entirely proper, was the result of his presence and conduct at the time the agents stopped the truck to arrest Gregory. Agent McFarland, who knew that Gregory had been convicted of liquor-law offenses, had received repeated telephone calls advising him that Gregory was operating an illegal still near Tasley and urging him to arrest Gregory. Although the source of this information did not identify himself, his persistence and the facts which he supplied evinced a detailed knowledge of Gregory's operation. The agent's own observations of Gregory's activities verified many of those facts and established a sound basis for believing that the information which McFarland received was accurate. *Draper* v. *United States,* 358 U.S. 307. They verified the information that Gregory had traded in his automobile for a truck, and he was seen operating that truck in the vicinity of the suspected still. When the agents learned that the truck was registered in the name of petitioner, who also was a known liquor-law violator, they had further cause to believe that Gregory had resumed his illegal activities.

In addition, the agents received information from local authorities concerning Gregory's still on the Eastern Shore and his use of the truck to drive to Norfolk. Although the source of this information was an untested informant, the information substantially corroborated the information which McFarland had received and the results of his own investigation. As

this Court said in *Jones* v. *United States,* 362 U.S. 257, 271, "Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that [Gregory] was a known [liquor-law violator] made the charge against him much less subject to scepticism than would be such a charge against one without such a history."

The information which the agents received from two sources, corroborated by their independent investigation and their knowledge of Gregory's prior offenses, established probable cause to believe that the truck was carrying untaxed liquor. See *Jones* v. *United States, supra; Draper* v. *United States, supra; Brinegar* v. *United States,* 338 U.S. 160; *Gilbert* v. *United States,* 366 F. 2d 923, 930–931 (C.A. 9), certiorari denied, 388 U.S. 922; *Katz* v. *Peyton,* 334 F. 2d 77 (C.A. 4), certiorari denied, 379 U.S. 915; *Bass* v. *United,* 326 F. 2d 884 (C.A. 8), certiorari denied, 377 U.S. 905; *United States* v. *Irby,* 304 F. 2d 280 (C.A. 4), certiorari denied, 371 U.S. 830. See, also, *United States* v. *One 1957 Ford Ranchero Pickup Truck,* 265 F. 2d 21 (C.A. 10).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*
FRED M. VINSON, JR.,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
MERVYN HAMBURG,
*Attorneys.*

AUGUST 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968